

WILLIAM K. COLE, )  
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 Plaintiff, )  
 )  
 vs. ) No. 2:14CV00007 ERW  
 )  
 DOC MCC, et al., )  
 )  
 Defendants. )

This matter is before the Court upon the motion of William Cole (registration no. 1002523), an inmate at Jefferson City Correctional Center, for leave to commence this action without payment of the required filing fee. For the reasons stated below, the Court finds that plaintiff does not have sufficient funds to pay the entire filing fee and will assess an initial partial filing fee of \$4.40. See 28 U.S.C. § 1915(b)(1). Additionally, the Court finds that the complaint fails to state a claim upon which relief can be granted, but the Court will give plaintiff an opportunity to file an amended complaint.

Pursuant to 28 U.S.C. § 1915(b)(1), a prisoner bringing a civil action in forma pauperis is required to pay the full amount of the filing fee. If the prisoner has insufficient funds in his or her prison account to pay the entire fee, the Court must assess and, when funds exist, collect an initial partial filing fee of 20 percent of the greater of (1) the average monthly deposits in the prisoner's account, or (2) the average monthly balance in the prisoner's account for the prior six-month period. After payment of the initial partial filing fee, the prisoner is required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. 28 U.S.C. § 1915(b)(2). The agency having custody of the prisoner will forward these

monthly payments to the Clerk of Court each time the amount in the prisoner's account exceeds \$10, until the filing fee is fully paid. Id.

Plaintiff has submitted an affidavit and a certified copy of his prison account statement for the six-month period immediately preceding the submission of his complaint. A review of plaintiff's account indicates an average monthly deposit of \$22.00, and an average monthly balance of less than \$22.00. Plaintiff has insufficient funds to pay the entire filing fee. Accordingly, the Court will assess an initial partial filing fee of \$4.40, which is 20 percent of plaintiff's average monthly deposit.

### **28 U.S.C. § 1915(e)**

Pursuant to 28 U.S.C. ' 1915(e)(2)(B), the Court must dismiss a complaint filed in forma pauperis if the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief. An action is frivolous if it lacks an arguable basis in either law or fact.@ Neitzke v. Williams, 490 U.S. 319, 328 (1989); Denton v. Hernandez, 504 U.S. 25, 31 (1992). An action is malicious if it is undertaken for the purpose of harassing the named defendants and not for the purpose of vindicating a cognizable right. Spencer v. Rhodes, 656 F. Supp. 458, 461-63 (E.D.N.C. 1987), aff'd 826 F.2d 1059 (4th Cir. 1987). A complaint fails to state a claim if it does not plead enough facts to state a claim to relief that is plausible on its face.@ Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

### **The Complaint**

Plaintiff brings this action under 42 U.S.C. § 1983. Plaintiff alleges that while he was incarcerated at Moberly Correctional Center ("MCC"), he was exposed to asbestos. Plaintiff says the asbestos made him sick, and he claims that he was denied medical care. Named as defendants are MCC, the Department of Corrections, and "MCC Medical." Plaintiff seeks

monetary relief.

### **Discussion**

The complaint fails to state a claim against the Missouri Department of Corrections because an agency exercising state power is not a “person” subject to a suit under § 1983. E.g., Barket, Levy & Fine, Inc. V. St. Louis Thermal Energy Corp., 948 F.2d 1084, 1086 (8th Cir. 1991). A suit against MCC or MCC Medical is, in effect, a suit against the State of Missouri. The State of Missouri, however, is absolutely immune from liability under ' 1983. See Will v. Michigan Dept. of State Police, 491 U.S. 58, 63 (1989). As a result, plaintiff’s claims against the Department of Corrections, MCC, and MCC Medical fail to state a claim upon which relief can be granted.

To state a claim under § 1983, plaintiff must name the individuals who harmed him and sue them in their individual capacities. Because plaintiff is proceeding pro se, the Court will allow plaintiff to file an amended complaint. Plaintiff shall have thirty days from the date of this Order to file an amended complaint. Plaintiff is warned that the filing of an amended complaint replaces the original complaint, and claims that are not realleged are deemed abandoned. E.g., In re Wireless Telephone Federal Cost Recovery Fees Litigation, 396 F.3d 922, 928 (8th Cir. 2005). If plaintiff fails to file an amended complaint within thirty days, the Court will dismiss this action without prejudice.

Accordingly,

**IT IS HEREBY ORDERED** that plaintiff’s motion to proceed in forma pauperis [ECF No. 2] is **GRANTED**.

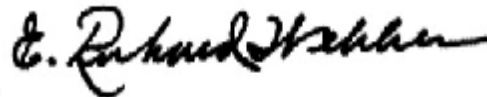
**IT IS FURTHER ORDERED** that the plaintiff shall pay an initial filing fee of \$4.40 within thirty (30) days of the date of this Order. Plaintiff is instructed to make his remittance payable to “Clerk, United States District Court,” and to include upon it: (1) his name; (2) his

prison registration number; (3) the case number; and (4) that the remittance is for an original proceeding. If plaintiff does not timely pay the fee, the Court will dismiss this action without prejudice.

**IT IS FURTHER ORDERED** that the Clerk shall mail to plaintiff a Prisoner Civil Rights Complaint form.

**IT IS FURTHER ORDERED** that plaintiff may file an amended complaint on the form within the next thirty (30) days. If plaintiff does not file an amended complaint, the Court will dismiss this action without prejudice.

So Ordered this 11<sup>th</sup> day of February, 2014.

A handwritten signature in black ink, appearing to read "E. Richard Webber", is written above a horizontal line.

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E. RICHARD WEBBER  
SENIOR UNITED STATES DISTRICT JUDGE